



# UNITED STATES PATENT AND TRADEMARK OFFICE

UNITED STATES DEPARTMENT OF COMMERCE  
United States Patent and Trademark Office  
Address: COMMISSIONER FOR PATENTS  
P.O. Box 1450  
Alexandria, Virginia 22313-1450  
www.uspto.gov

APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
10/596,789	06/23/2006	Philippe Teissier	033339/313045	1481

826 7590 09/13/2011

ALSTON & BIRD LLP  
BANK OF AMERICA PLAZA  
101 SOUTH TRYON STREET, SUITE 4000  
CHARLOTTE, NC 28280-4000

EXAMINER
----------

BADR, HAMID R

ART UNIT	PAPER NUMBER
----------	--------------

1781

MAIL DATE	DELIVERY MODE
-----------	---------------

09/13/2011

PAPER

**Please find below and/or attached an Office communication concerning this application or proceeding.**

The time period for reply, if any, is set in the attached communication.

***Advisory Action***

Applicants' amendment after final rejection filed 8/25/2011 is acknowledged.

The amendment is entered for appeal purposes.

The rejection of claim 11 under 35 U.S.C. 112 second paragraph is maintained.

The amendment to claim 11 does not resolve the 112 second paragraph issue. Claim 1 does not involve a granulation process.

The rejection of claims under 35 U.S.C. 103(a) is maintained.

***Response to Arguments***

Applicants' arguments have been considered. These arguments are not persuasive for the following reasons.

1. Applicants argue that R1 does not disclose granules having a size less than 200 microns.

a. R1 discloses a granule size range of 50-500. Therefore, granules of less than 200 microns and larger than 50 microns are disclosed by R1.

2. Applicants argue that R1 does not disclose fats, waxes and fatty acids as the coating material.

a. The rejection is an obviousness rejection. The enteric coating is disclosed by R1. The encapsulation of bacteria in fatty materials is disclosed by R2. Therefore, a coating comprising fatty materials would be motivated and obvious in view of R2.

3. Applicants argue that the encapsulated organisms of R2 are obtained with very different equipment and process.

a. Although R2 does not disclose the same process or equipment for making encapsulated bacteria, it is noted that “[E]ven though product-by-process claims are limited by and defined by the process, determination of patentability is based on the product itself. The patentability of a product does not depend on its method of production. If the product in the product-by-process claim is the same as or obvious from a product of the prior art, the claim is unpatentable even though the prior product was made by a different process”, *In re Thorpe*, 777 F.2d 695, 698, 227 USPQ 964, 966 (Fed. Cir. 1985) . Further, “although produced by a different process, the burden shifts to applicant to come forward with evidence establishing an unobvious difference between the claimed product and the prior art product”, *In re Marosi*, 710 F.2d 798, 802, 218 USPQ 289, 292 (Fed. Cir.1983).See MPEP 2113.

Therefore, absent evidence of criticality regarding the presently claimed process and given that R2 meets the requirements of the claimed product, R2 clearly meet the requirements of the present claims.

4. Applicants argue that R2 does not disclose the incorporation of the encapsulated granules into a liquid food.

a. The incorporation of the granules into liquid and semi-solid foods is disclosed by the primary reference R1. Please see the final rejection under R1 disclosure.

5. Applicants argue that none of the references disclose preparing an aqueous beverage with imperceptible granules.

a. Perceiving granules in the mouth would depend on the granule size. R1 discloses a range of 50-500 microns for the granules. Furthermore, R1 clearly discloses that such granules can be incorporated in liquid food. The granules in such foods are expected to be intrinsically imperceptible.

### ***Conclusion***

Any inquiry concerning this communication or earlier communications from the examiner should be directed to HAMID R. BADR whose telephone number is (571)270-3455. The examiner can normally be reached on M-F, 8:00-5:00.

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Donald Tarazano can be reached on (571) 272-1515. The fax phone number for the organization where this application or proceeding is assigned is 571-273-8300.

Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for published applications may be obtained from either Private PAIR or Public PAIR. Status information for unpublished applications is available through Private PAIR only. For more information about the PAIR system, see <http://pair-direct.uspto.gov>. Should you have questions on access to the Private PAIR system, contact the Electronic Business Center (EBC) at 866-217-9197 (toll-free). If you would like assistance from a USPTO Customer Service Representative or access to the automated information system, call 800-786-9199 (IN USA OR CANADA) or 571-272-1000.

Application/Control Number: 10/596,789

Page 5

Art Unit: 1781

/D. Lawrence Tarazano/  
Supervisory Patent Examiner, Art Unit 1781

HAMID R BADR  
Examiner  
Art Unit 1781